

Privacy Law Final Exam

Professor Todd Cheesman

Massachusetts School of Law

Student Number _____

May 16, 2012
Essay Exam
Open Book, Open Notes

Instructions: Read Carefully

1. You should receive this exam by 6:00 PM Wednesday, May 16th. I will also post a copy of this exam to our website in case your spam filter rejects my email.

You have three (3) hours from the sent time to complete this exam. When you are done, email your exam to cheesman@msslw.edu. Do not wait until the last minute to do so. Late papers will be penalized. Any lateness will result in a minimum deduction of one full letter grade.

I will send confirmation once I have received your exam. Make sure to allow enough time for your exam to be transmitted. Exams are not considered received until I send you email confirmation. No time exceptions will be granted due to computer, equipment or power failures, or for failures transmitting the exam.

Of course, students with medical exemptions who have been cleared with the registrar's office will be allotted additional time as permitted. If you have been allotted extra time or if you have been cleared by the Dean's office to take the exam on a different date, you should notify me ASAP. I do not expect to be notified the day of (or the week of) the exam.

When I have received your exam I will send you an email confirmation after I have confirmed the document is printable and that you have followed the instructions properly. Your exam is not considered officially received until I send this email confirmation. Again, you should allot sufficient time for this process as well as equipment and Internet delays in submitting your answer.

2. This is an open book exam; however, you may only use materials on our website or those materials directly linked to from our website. However, during the exam, you may not communicate about the exam or any of your answers with anyone (orally, electronically or otherwise). If you refer to any material that is not your unique work product, it must be properly cited. Failure to reference quoted, paraphrased or otherwise unoriginal material on your exam is an honor violation and will be dealt with accordingly.

While I do not expect Blue Book formatting on a timed exam, you should at least indicate the name of the work and the author you are referencing (e.g., "John Smith's treatise on E-Commerce taxation originally proposed the theories of X, Y and Z"). You can mention your reference in the body of your writing, as a footnote or endnote. Just make sure you give credit where credit is due!

3. Submit your answers to me in .doc, .docx or .rtf format only. **I will not accept other formats.**

4. Write your exam number at the top of this exam.

5. Leave the call of all questions as-is but boldface or change the font color of your answer to help me more easily identify and read your work product.

6. Answer all questions to the best of your ability. Allocate adequate time for each question. A great answer on question one will not make up for your leaving question two blank.

7. **Do not address material we did not cover in class. If you talk about legal issues we did not discuss, I will deduct points from your exam. You could lose a lot of points this way.**

Other guidance:

- Unless stated otherwise, assume that all relevant parties are, and all relevant actions take place, in the US.
- Spend adequate time reading the question and outlining a response.
- Read each question very carefully. Answer the questions actually asked. Do not answer questions that I did not ask.
- Prioritize your discussion. Extensive discussion of irrelevant issues may hurt your score.
- If you think additional information would help your analysis, explain what information you would

like (and why it would help) and then state your assumptions to continue with your analysis. Similarly, if you need to assume any further information in order to answer a question, explain what information you are assuming and the consequences this has for your answer.

- Bullet points and abbreviations are not acceptable. Use your best legal writing.
- Please quote statutes or cases only as necessary to make your point. However, if you do reference any material that is not your own work product, you must reference it.
- While generally your answer should be based on legal principles, you are also welcome to address other perspectives and concerns such as public policy.
- If you have questions or concerns during the exam, please email me and I will reply ASAP.
- Failure to follow the instructions, of course, will adversely affect your grade.
- Where appropriate, you should carefully analyze the situation and choose the best answer to each question. As you think through the problem, try to think through it methodically. Consider all the elements and possible defenses or counter-arguments.

Good luck and have a great Summer!

Part I Short Essays

When presenting your answer, include the number and call of the question at the beginning of each answer.

1. Describe some of the tensions between individual privacy and democratic government.
2. Does it make sense that the Supreme Court would legalize abortion by citing rights to privacy? If so, why? If not, why not?
3. Do you have any expectation of privacy in your workplace? If so, to what extent? If not, why not?
4. Is privacy a constitutional right, tort law or a negotiated right? Is it something else?

Part II Longer Essays

Answer both of the essay questions below. **When presenting your answer, include the number and call of the question at the beginning of each answer.**

Question Number 1

You are clerk to a federal district court judge.

Before the judge is a motion to suppress evidence obtained by the police in the course of a criminal investigation. According to the non-disputed facts in the case, the police obtained evidence from the suspect's home computer by means of Omnivore, a computer program that circulates widely on the Internet and appears as a form of spam. Omnivore is designed so that when it is downloaded onto a computer with a particular IP address¹, it will identify key computer files relevant to a current criminal investigation and transmit those files from the suspect's computer to the police. No warrant was obtained prior to the release of the program in this case.

It is the defendant's position that the use of Omnivore violates both the Fourth Amendment and the federal wiretap law. It is the government's position that the defendant had no reasonable expectation of privacy in the files that could be obtained by this technique and also, that if a search did occur, the defendant effectively consented in the act of downloading the program.

Write a brief memo for the judge explaining whether the motion to suppress should be granted.

1 An IP address is a device's (typically a computer's) numerical address as expressed in the format specified in the Internet Protocol. In IPv4, the addressing format, an IP address is a 32-bit sequence divided into four groups of decimal numbers separated by periods. In some circumstances, it does not. An IP address for a computer is similar to a telephone number for a telephone.

Question Number 2

You are assistant counsel to Chief Privacy Officer of the Department of Homeland Security.

The CPO has conveyed to you that the Secretary of the Department of Homeland Security is concerned about the vulnerability of the United States Capitol to attack from a passenger train that travels beneath the US Capitol. He has explained to the CPO that he intends to consider a wide range of measures to address this threat, but would like input from her office regarding privacy issues that should be considered. In particular, he has asked the CPO to assess three proposals:

- (1) Extend visual surveillance of all railway cars traveling under the US Capitol. Under this proposal, cameras would be placed in all railway cars so that it would be possible to observe all passengers at all times.
- (2) Identification requirements for all rail passengers and transportation workers. Under this proposal, a passenger screening program similar to CAPPs would be established for railway passengers.
- (3) Enhanced sensory techniques would be employed. Under this proposal, the Department of Homeland security would support efforts to identify and track explosive materials and biohazards that may be carried aboard trains that travel beneath the Capitol.

Outline a brief memo for the Chief Privacy Officer assessing the legal and policy implications of these three proposals.

END OF EXAM

Have a Great Summer!

Privacy Law
Professor Todd Cheesman
Final Examination

Student Number _____
Massachusetts School of Law
Spring 2011

Instructions: Read Carefully

Failure to adhere to these rules will result in loss of grade.

1. **You will be identified by your student number.** This is how your grade will be submitted to the Registrar. Students who do not supply a student number will receive a zero grade for the final exam. To all 3Ls: without a student number to identify your exam, you will not graduate.
2. You have until 9:00 pm to complete this exam and return it to my gmail account. *Late submissions will be penalized; therefore, it would be wise to plan to finish your exam, spell-check it and return it to me at least several minutes in advance of the deadline.*
3. This is an open book exam; however, you may only use materials on our website or those materials directly linked to from our website. You may not speak to other students for any reason during the exam. You may not refer to any materials on our Westlaw forum during the exam.
4. Submit your answers to me in .doc, .pdf or .rtf format only. I will not accept .docx or other formats.
5. Write your exam number on the front of your exam but do not include your name anywhere on the test.
6. Please use proper grammar and punctuation. If you reference any materials that are not your unique work product, indicate them as such. While I do not expect Blue Book formatting on a timed exam, you should at least indicate the name of the work and the author you are referencing (e.g., "John Smith's treatise on workplace privacy originally proposed the theories of X, Y and Z"). You can mention your reference in the body of your writing, as a footnote or endnote. Just make sure you give credit where credit is due! Remember, plagiarism is cheating.
7. Cheating of any form will not be tolerated and will be reported to the school administration. Do not discuss this exam with other students after the exam as there may be other students who have not yet taken it.
8. Late submissions will be penalized so be careful about waiting until the last minute to submit your exam. Do not attempt to misrepresent or alter the "sent time" of your email as this will be

considered cheating. Students with time extensions have until 12:30. Exams submitted after that time will not be accepted for any reason.

9. This exam consists of two sections. Section I, "Short Essays", is worth 1/3 of your grade. Section II, "Longer Essay Questions", is worth 2/3. You should allot your time accordingly although you should have ample time to complete the exam. Therefore, do not write a full answer for one part and a short answer for another. Each question is weighted individually, so do not write an in-depth response to one question at the expense of writing an abbreviated answer for another.

10. Where appropriate, you should carefully analyze the situation and choose the best answer to each of the questions. As you think through the problem, try to think through it methodically. Consider all the elements and possible defenses or counter-arguments.

11. You should state the legal rule(s) on which your answer is based and why you think that rule or those rules apply. Answer each question as fully as you can, citing any appropriate cases, industry standards, and statutes that are relevant. Be sure to state any assumptions you make and the bases for your conclusions.

Good luck!

Part I Short Essays

Some of these questions concern matters of fact; others are designed to elicit informed opinions. Approach each from the perspective of what I, your professor, would be looking to see that you have learned from this course.

When presenting your answer, include the number and call of the question at the beginning of each answer.

1. Is privacy a constitutional right, tort law or a negotiated right?
2. Databases have existed for thousands of years in various forms. Give an example of a preexisting database and explain the benefits and risks of computerizing it.
3. Can, and if so under what circumstances may, Miranda be suspended, abridged or modified, for instance, in the case of national security? Also discuss privacy implications of suspending Miranda.

Part II Longer Essays

Answer both of the questions below. **When presenting your answer, include the number and call of the question at the beginning of each answer.**

Question Number 1

You are special counsel to the President.

The President has indicated that he would like to introduce legislation that would require drug testing prior to the issuance of a driver's license. The proposal would specifically require that all first-time applicants for a driver's license certify that they have taken a urinalysis drug test within 30 days prior to application and that the test result was negative.

Draft a brief memo for the President on whether such a measure would be Constitutional.

Question Number 2

You are counsel to the Comptroller of the Currency.

The Comptroller has been placed in charge of a new task force on Consumer Electronic Payments. The mission of the Task Force is to "identify, in partnership with the industry and the public, issues affecting consumers raised by emerging electronic money and payment technologies and explore innovative responses that are consistent with the needs of a developing market."

Write a brief memo for the Comptroller on consumer privacy issues.

END OF EXAM

Have a Great Summer!

Privacy Law
Professor Todd Cheesman
Final Examination

Student Number _____
Massachusetts School of Law
Spring 2009

Instructions: Read Carefully

Failure to adhere to these rules will result in loss of grade.

1. You have until 9:00 pm to complete this exam and return it to my gmail account. *Late submissions will be penalized; therefore, it would be wise to plan to finish your exam, spell-check it and return it to me at least several minutes in advance of the deadline.*
2. This is an open book exam; however, you may only use materials on our website or those materials directly linked to from our website. You may not speak to other students for any reason during the exam. You may not refer to any materials on our Westlaw forum during the exam.
3. Submit your answers to me in .doc, .pdf or .rtf format only. I will not accept .docx or other formats.
4. Write your exam number on the front of your exam but do not include your name anywhere on the test.
5. Please use proper grammar and punctuation. If you reference any materials that are not your unique work product, indicate them as such. While I do not expect Blue Book formatting on a timed exam, you should at least indicate the name of the work and the author you are referencing (e.g., "John Smith's treatise on workplace privacy originally proposed the theories of X, Y and Z"). You can mention your reference in the body of your writing, as a footnote or endnote. Just make sure you give credit where credit is due! Remember, plagiarism is cheating.
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8. This exam consists of two sections. Section I, "Short Essays", is worth 1/3 of your grade. Section II, "Longer Essay Questions", is worth 2/3. You should allot your time accordingly although you should have ample time to complete the exam. Therefore, do not write a full answer for one part and a short answer for another. Each question is weighted individually, so do not write an in-depth response to one question at the expense of writing an abbreviated answer for another.

9. Where appropriate, you should carefully analyze the situation and choose the best answer to each of the questions. As you think through the problem, try to think through it methodically. Consider all the elements and possible defenses or counter-arguments.

10. You should state the legal rule(s) on which your answer is based and why you think that rule or those rules apply. Answer each question as fully as you can, citing any appropriate cases, industry standards, and statutes that are relevant. Be sure to state any assumptions you make and the bases for your conclusions.

Good luck!

Section I: Short Essays (Recommended Time: 60 minutes)

Each question below is worth a maximum of 8 points. If you do not understand a question for any reason, select another question instead.

1. One of Expedian Credit Assessment Company's (ECAC) sources of income is renting the lists it maintains containing financial data for millions of customers. ECAC has been approached by the Internal Revenue Service to match credit information with income tax return information for high-income taxpayers. (a) what does the IRS want by making this request? (b) Is this request allowable under the provisions of the Privacy Act of 1974 and any other applicable laws we have discussed this semester? (c) What problems and privacy issues will the IRS encounter if it goes ahead with the plan?
2. In order to study patterns of financial aid in higher education, the U. S. Bureau of the Census will be conducting a nationwide survey of colleges and universities. The Bureau wants information contrasting students who receive financial aid with students who do not. Included in the data requested are Social Security Number, personal and family financial information, source of financial aid, and other demographic information such as age, sex, and place of residence. Grade transcripts have also been requested. Overlord College must decide whether to provide the information or to refuse. Refusal might result in litigation or eventually the loss of some government funding. What do you think the college should do and why? Might the request for information or the disclosure of such information be in violation of any privacy laws we have discussed this semester?
3. Terry Cutler, a congressional staffer, maintained a blog that discussed, among many other topics, Terry's intimate encounters with several coworkers and government officials. When Terry's employer, a Member of Congress, discovered the blog Terry was fired. Did the firing violate the aide's right to privacy or freedom of speech?
4. In the aftermath of Hurricane Katrina, the Federal Emergency Management Agency (FEMA) hurriedly constructed a database of information on evacuees. In the chaos of the evacuation, privacy waivers were not offered to many evacuees, misfiled, lost, or simply not signed. About six weeks after the hurricane, FEMA announced that the database would no longer be available to individuals seeking lost family members, agencies such as the Red Cross, or even to state governments attempting to locate parolees and sex offenders. What law is FEMA's policy based on? Do you believe this privacy law should be suspended in this instance? Explain what limitations you would place on access to the database and why.

Section 2: Longer Essay Questions (Recommended Time: 120 minutes)

Responses should include reasoned arguments, specific examples, and analogies, where appropriate, to support or illustrate your answers. Before you start each problem, take a few minutes to think and outline your ideas. Write a well-organized, coherent answer.

Choose four of the questions below to answer. Each question has a maximum value of 17 points. If you do not understand a question for any reason, select another question instead.

1. You are Associate General Counsel at GlobalEx, a global manufacturing company. Until recently, GlobalEx was based in the US and had 200 employees. Thanks to a turn in the stock market, GlobalEx has acquired companies and grown significantly in the past five years, and now has 20,000 employees in every region of the world. As part of the integration of all of the acquired companies and their employees, GlobalEx wants to implement a new electronic Human Resource ("HR") system that would allow the HR department in Nebraska and the Payroll department in Utah to access the personal information of all of GlobalEx's employees. The Vice President of HR tells you that BenefitsHelp, a third-party company in Nevada that administers employee benefit information for GlobalEx would also need access to all of GlobalEx's employee information. "Actually," the VP of HR confides to you, "BenefitsHelp doesn't really need access to all of an employee's personal information, but it is easier and quicker for HR to email them the complete employee information file, rather than pick and choose the specific pieces of information that BenefitsHelp needs for its 20,000 employees." The VP of HR wants to move quickly to roll out the new HR system, but your boss, the General Counsel, has concerns about employee privacy, especially now that they have employees all over the world. "I know there are issues here," she tells you, "but I don't know privacy law very well. You took a class in Privacy Law at MSLaw so you tell me: what are the issues and risks, and what should I tell GlobalEx to do?"

2. What technologies have we discussed that exist to protect privacy (online and offline)? To what extent are they effective at protecting the individual? How do laws like Patriot, ECPA and the other privacy acts we have discussed this semester affect an individual's ability to protect their own privacy? Also, discuss the relative effectiveness of self-policing by the data collection industry.

END OF EXAMINATION

Have a Great Summer!

Privacy Law

Student Number _____

Professor Todd Cheesman

Massachusetts School of Law

Final Examination

Spring 2007

Instructions: Read Carefully

THIS IS A CLOSED BOOK EXAMINATION

1. You have three (3) hours to complete this exam.
2. This is a closed book exam. As such, you may not use any notes, books or other outside materials to assist you in responding to the questions. You may not speak to other students for any reason during the exam. If you have questions, I can be reached at 603-998-3896. Ask your proctor for assistance and he or she will call me with your question while you continue to work.
3. Write your answers in the blue book, or type them on your computer using the school-approved software, Extegrity's *Exam 4*. Identify which answer(s) you are responding to on the cover of each blue book.
4. Write your exam number on the top of this exam booklet and on each blue book you use including books you use for notes or outlines. If typed, note your exam number at the top of your typed pages. Do not use your name on any

exam materials EXCEPT FOR your student pledge that you are to sign and hand in SEPARATELY.

5. PLEASE WRITE LEGIBLY OR PRINT IF YOUR HANDWRITING IS DIFFICULT TO READ, WRITE ONLY ON THE FRONTS OF PAGES AND ONLY ON EVERY OTHER LINE. If I cannot read your response to a question, your grade will be adversely affected.
6. Cheating of any form will not be tolerated and will be reported to the school administration. There is a student pledge following these instructions for you to sign to acknowledge you have read the terms and agree to them.
7. This make up exam consists of one section. Each question you answer is worth 25% of your grade. You should allot your time accordingly although you should have ample time to complete the exam. Therefore, do not write a full answer for one part and a short answer for another.
8. Where appropriate, you should carefully analyze the situation and choose the best answer to each of the questions. As you think through the problem, try to think through it methodically. Consider all the elements and possible defenses or counter-arguments.

9. You should state the legal rule(s) on which your answer is based and why you think that rule or those rules apply. Answer each question as fully as you can, citing any appropriate cases, industry standards, and statutes that are relevant. Be sure to state any assumptions you make and the bases for your conclusions.

10. At the end of the exam, return all exam materials to the proctor. Do not leave the room for any reason with any exam materials. This includes blue books in which you have outlined your answers or jotted notes. You may indicate that such books are merely for your reference but you must hand them in as well.

Good luck!

STUDENT PLEDGE

I _____ acknowledge I am aware of the Massachusetts School of Law policy on cheating and assert that I have not discussed the content or format of the final exam with any student in my class nor have I in any other way attempted to gain an unfair advantage over other students with regard to the exam.

Signature

Date

Section I: Short Essays (Recommended Time: 60 minutes)

Select three of the questions below to answer. Write your answers in your blue books, indicating on the cover and at the beginning of each answer, which question(s) to which you are responding. This section is worth 1/3 of your grade.

1. One of Expedian Credit Assessment Company's (ECAC) sources of income is renting the lists it maintains containing financial data for millions of customers. ECAC has been approached by the Internal Revenue Service to match credit information with income tax return information for high-income taxpayers. (a) what does the IRS want by making this request? (b) Is this request allowable under the provisions of the Privacy Act of 1974 and any other applicable laws we have discussed this semester? (c) What problems and privacy issues will the IRS encounter if it goes ahead with the plan?
2. In order to study patterns of financial aid in higher education, the U. S. Bureau of the Census will be conducting a nationwide survey of colleges and universities. The Bureau wants information contrasting students who receive financial aid with students who do not. Included in the data requested are Social Security Number, personal and family financial information, source of financial aid, and other demographic information such as age, sex, and place of residence. Grade transcripts have also been requested. Overlord College must decide whether to provide the information or to refuse. Refusal might

result in litigation or eventually the loss of some government funding. What do you think the college should do and why? Might the request for information or the disclosure of such information be in violation of any privacy laws we have discussed this semester?

3. In the tragic aftermath of Hurricane Katrina, the Federal Emergency Management Agency (FEMA) hurriedly constructed a database of information on evacuees. In the chaos of the evacuation, privacy waivers were not offered to many evacuees, misfiled, lost, or simply not signed. About six weeks after the hurricane, FEMA announced that the database would no longer be available to individuals seeking lost family members, agencies such as the Red Cross, or even to state governments attempting to locate parolees and sex offenders. What law is FEMA's policy based on? Do you believe this privacy law should be suspended in this instance? Explain what limitations you would place on access to the database and why.

4. In February 2006, the U. S. Department of Justice sued Google for refusing to provide search engine statistics on its users. From what legislation did this case result? Briefly explain the positions taken by the opposing sides in the suit. If you were a Supreme Court justice, what would your opinion be? Why?

5. You are a member of a panel that will write policies and set standards for a new database your company is about to initiate. The database will store financial and demographic information on mortgage refinancing. In addition to commenting on the confidentiality concerns raised by the database, comment on what data may properly be shared with other businesses and governmental agencies, and under what circumstances.

Section 2: Longer Essay Questions

Responses should include reasoned arguments, specific examples, and analogies, where appropriate, to support or illustrate your answers. Before you start each problem, take a few minutes to think and outline your ideas. Write a well-organized, coherent answer.

Choose four of the questions below to answer. You should allot 30 minutes per question. If you do not understand a question for any reason and you are unable to reach me by telephone, select another question instead. This section is worth 2/3 of your grade.

1. You are Associate General Counsel at GlobalEx, a global manufacturing company. Until recently, GlobalEx was based in the US and had 200 employees. Thanks to a turn in the stock market, GlobalEx has acquired companies and grown significantly in the past five years, and now has 20,000 employees in every region of the world. As part of the integration of all of the acquired companies and their employees, GlobalEx wants to implement a new electronic Human Resource ("HR") system that would allow the HR department in Nebraska and the Payroll department in Utah to access the personal information of all of GlobalEx's employees. The Vice President of HR tells you that BenefitsHelp, a third-party company in Nevada that administers employee benefit

information for GlobalEx would also need access to all of GlobalEx's employee information. "Actually," the VP of HR confides to you, "BenefitsHelp doesn't really need access to all of an employee's personal information, but it is easier and quicker for HR to email them the complete employee information file, rather than pick and choose the specific pieces of information that BenefitsHelp needs for its 20,000 employees." The VP of HR wants to move quickly to roll out the new HR system, but your boss, the General Counsel, has concerns about employee privacy, especially now that they have employees all over the world. "I know there are issues here," she tells you, "but I don't know privacy law very well. You took a class in Privacy Law at MSLaw so you tell me: what are the issues and risks, and what should I tell GlobalEx to do?"

2. What technologies have we discussed that exist to protect privacy (online and offline)? To what extent are they effective at protecting the individual? How do laws like Patriot, ECPA and the other privacy acts we have discussed this semester affect an individual's ability to protect their own privacy? Also, discuss the relative effectiveness of self-policing by the data collection industry.

3. Discuss the value of collecting information on Internet use to (1) the individual, (2) the government, and (3) business entities. What present and potential (future) threats to privacy from electronic data collection do you perceive? Given

the ability to access, amass and store an individual's personal information, discuss the invasion of privacy/common-law right to privacy torts that are implicated by large, cross-referenced databases, anonymous postings on the Internet and the ability to make an individual's private facts become publicly accessible via "non-traditional" media (e.g., the Internet, blogs, Wiki, listservs).

4. What do we mean by the terms privacy, anonymity and confidentiality? What are the challenges to these topics in the information age? How might it be possible to reform existing laws to simultaneously protect our privacy and allow us to enjoy the benefits of our increasingly digital world?

5. Discuss the situation in which the government, using constitutionally acceptable surveillance or data collection methods could acquire information about an individual and their activities such that, even though the individual was not engaged in illegal conduct, their liberty would be curtailed.

END OF EXAMINATION